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No. 99-699

IN THE
SUPREME COURT OF THE UNITED STATES

BOY SCOUTS OF AMERICA,

Petitioner,

v.

JAMES DALE,

Respondent.

On Writ of Certiorari to the
Supreme Court of New Jersey

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does State law requiring Boy Scout troop to appoint avowed homosexual and gay rights activist as assistant scoutmaster responsible for communicating Boy Scouting's moral values to youth members abridge First Amendment rights of freedom of speech and freedom of association?

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INTEREST OF THE *AMICUS*[1]

The Center for the Original Intent of the Constitution was formed by the Home School Legal Defense Association in 1998, and now operates under the auspices of Patrick Henry College. The Center holds that the interpretation of the Constitution according to the original intent of the Founders is the only safe basis for the preservation of limited government and all rights including those important to our association. The Center exists to systematically research and advocate constitutional interpretation according to the principle of original intent.

The Center has filed a number of briefs explaining how *federalism* enhances freedom. Our Founders understood that power should be exercised as close to home as possible, and our federal Constitution makes real their vision of decentralized and limited government. That vision is in danger of being lost, today.

Federalism was an important part of our Founders' original intent, but it was not their only concern. Federalism was one means to their overarching vision of liberty through law. That vision of liberty included those common law privileges

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[1] Pursuant to Rule 37.6, this brief was authored, prepared, and paid for in its entirety by the Center for the Original Intent of the Constitution at Patrick Henry College and the Home School Legal Defense Association. No counsel for a party authored any part of this brief, nor did any person or entity other than *amicus curiae*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

The amicus curiae requested and received the written consents of the parties to the filing of this brief. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court. See Sup. Ct. Rule No. 37.3(a).

and immunities that they had fought to retain during their war with Great Britain.

Our Founders were so concerned that the new federal government could threaten the traditional "rights of Englishmen" that they wrote a Bill of Rights to make sure the new federal government did not become a new form of tyranny. Most of the first ten Amendments enshrine their commitment to protect recognized common law privileges from federal usurpation.

After the Civil War, our ancestors extended the federal guarantee of limited government to the States. They enacted the Fourteenth Amendment, which expressly protects the "privileges and immunities of citizens of the United States" from State infringement U.S. Const. Amend. XIV, § 1, cl. 2. This *amicus* respectfully argues that this Court made a crucial mistake when it interpreted that clause in *The Slaughterhouse Cases*, 83 U.S. 36 (1872). The Fourteenth Amendment was originally intended to keep States from infringing those "civil rights" which had been denied to African-Americans in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), and which had been statutorily conferred by the Civil Rights Act of 1866.

This *amicus* believes the whole point of the Fourteenth Amendment was to protect the well-recognized privileges and immunities of the common law from State infringement, not to unleash a regime of purely subjective government by judiciary. This *amicus* hopes to see Fourteenth Amendment jurisprudence eventually placed upon a solid common-law foundation.

Our interest is to preserve the blessings of liberty for ourselves and our posterity. U.S. Const. Preamble. We seek to

do this by holding the federal government to the terms of our original social contract: the Constitution. Faithful adherence to the original intent of the Founders is essential; not because they are ancient and deserve veneration, but because they were the elected representatives of the people.

Self-government demands that the intention of the elected Framers should always prevail over the views of unelected judges guided by floating notions of a "living Constitution." Our Founders made promises to the people that ratified the Constitution. Those promises are what are ultimately at stake in this case.

SUMMARY OF ARGUMENT

The New Jersey Supreme Court devoted a mere two paragraphs to a discussion of whether its interpretation of the Law Against Discrimination, N.J.S.A. §§ 10:5-1 to 49, ("LAD"), infringed a parent's express statutory right to direct the education and upbringing of a child under his control. The court noted that parental rights could extend to persons, "like a step-parent," whose "intent it is to assume the parental relationship." But the court limited its analysis of parental rights, in effect, to a question of whether Scoutmasters *are* parents. New Jersey forced parental rights onto the bed of Procrustes, and then amputated the parental rights claim to make it fit. A quick review of this Court's cases proves that the problem here is New Jersey's cramped understanding of parental rights.

When this Court first articulated the right "to direct the education and upbringing of a child" in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), it was a right that was actually exercised in association with others. The only plaintiffs in *Pierce* were a Catholic school and a military academy. The parental right to "direct" the education of a child includes the right to have someone else do the actual teaching. According to *Pierce*, the parent's right to direct the destiny of a child goes to the very heart of our system of ordered liberty:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the

> right, coupled with the high duty, to recognize and prepare him for additional obligations.

Pierce, 268 U.S. at 535.

The New Jersey court assumes parental rights vanish in association. The original intent of the Constitution, as reflected by the time-honored decisions of the Court, together with our common law tradition, does not agree with this truncated view of associational parental rights. Two fundamental rights—parental rights and the freedom of association—protect the parental liberty to bring up their young sons in an organization without homosexual activists for leaders.

Parents have both the right and the "high duty" to shape the values of their children, and that right is strengthened, not weakened, when citizens come together to inculcate shared values in a Boy Scout troop. The decision below undermines those constitutionally protected freedoms. The decision below should be reversed.

ARGUMENT

NEW JERSEY LAW, AS APPLIED, VIOLATES THE FOURTEENTH AMENDMENT BY INFRINGING UPON THE PROTECTED PRIVILEGES OF AMERICAN PARENTS

A. THE COURT IGNORED THE PARENT'S FEDERAL CONSTITUTIONAL RIGHT TO *DIRECT* THE UPBRINGING OF THE PARENT'S CHILD

The Law Against Discrimination, expressly affirms "the right of a natural parent or one *in loco parentis* to direct the

education and upbringing of a child under his control." N.J.S.A. 10:5-51. The New Jersey Court limited its inquiry to whether *Scoutmasters*, in and of their own right, have a right to direct the education and upbringing of a child. The court failed to consider whether its ruling might infringe the parent's *own* right to direct the upbringing of his or her child.

The lower court failed to consider whether the federal parental rights doctrine extends to associational exercise like the Boy Scouts. This is not a question of first impression: this Court's ground-breaking parental rights cases *only* involved parental rights in an assocation. This Court has consistently held that the Fourteenth Amendment prohibits States from depriving parents of such liberties, whether acting individually, *see*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), or together, *see, Pierce, supra; Meyer v. Nebraska*, 262 U.S. 390 (1923).

B. PARENTAL RIGHTS AT COMMON LAW

This Court has long relied on history and tradition as the text for parental rights analysis. As Chief Justice Burger noted:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." *Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).* See also

> *Wisconsin v. Yoder, 406 U.S. 205, 213 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Meyer v. Nebraska, 262 U.S. 390, 400 (1923)*.... The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. 1 W. Blackstone, Commentaries 447; 2 J. Kent, Commentaries on American Law 190.

Parham v. J.R., , 442 U.S. 584, 602 (1979)

Under the common law, parents had a right to direct the education and upbringing of a child, and there was never any doubt as to whether this right could be exercised in association with others. Groups of parents routinely hired schoolmasters to teach their children, just as individual parents hired tutors. These tutors and schoolmasters exercised the delegated authority of the parent himself. A parent could:

> delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then in loco parentis, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

1 W. Blackstone, *Commentaries on the Laws of England* 441 (1769).

The schoolteacher was the very paradigm of the persons standing *in loco parentis*. Parents also sought apprenticeships for their children, and masters likewise stood *in loco parentis*. This was certainly what the New Jersey Supreme Court believed in 1842, when it said:

> The master, to a certain extent, stands in loco parentis, and it is of great importance, as well to society as to the parents and the apprentice, that he should be well instructed in the art or trade to which he has been bound; and that his moral conduct and character should be watched over and cultivated.

Thorpe v. Rankin, 19 N.J.L. 36, 40-41 (1842); *see also Force v. Haines*, 17 N.J.L. 385, 399 (1840) ("apprentices, towards whom the master is *in loco parentis*").

The common law notion of parental rights has not become irrelevant with the passage of time. Quite the contrary: this Court has recently relied upon concepts of *in loco parentis* to decide other constitutional questions. In *Vernonia School Dist. v. Acton*, 515 U.S. 646 (1995), for example, this Court allowed schools to conduct drug tests that would have been unconstitutional for law enforcement agents. Justice Scalia wrote:

> When parents place minor children in private schools for their education, the teachers and administrators of those schools stand in loco parentis over the children entrusted to them. In fact, the tutor or schoolmaster is the very prototype of that status.

Vernonia, 515 U.S. at 654-55.

Similarly, in *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986), this Court noted the right of school authorities, acting *in loco parentis*, to govern school libraries in a way that would be otherwise impermissible under the First Amendment.

If parental rights can be limited to just those things the parents do themselves, then *Vernonia* and *Bethel* were wrongly decided. It was school officials, not parents, who conducted the drug tests and selected library books. These cases only make sense because parents can delegate their authority to others, who then stand in the place of the parents. But if parents can delegate their common law privileges and immunities to school officials, surely they can delegate them to Scoutmasters.

C. PARENTAL RIGHTS IN CONSTITUTIONAL LAW

The New Jersey court would only uphold parental rights when the parents, themselves, are shaping values, not when they seek help from others. As we have seen, this is not how parental rights operated at common law. It also flies in the face of the federal cases on the subject. This Court's watershed cases on parental rights makes it obvious how far the lower court missed the mark.

If the New Jersey court was right, then this Court was wrong in *Pierce, supra*. The New Jersey court limited parental rights to parents and step-parents, but the nuns who ran that Oregon school did not intend to *adopt* the children whose Catholic parents sent them there. Under the rule established below, Oregon would have been free to abolish secular private schools, although religious schools might be independently protected on free exercise grounds. But the other plaintiff in *Pierce* was Hill Military Academy, a secu-

lar private school. *Pierce* was decided on the basis of parental rights, not free exercise.

If New Jersey was right, then this Court was wrong in *Meyer, supra*. The teachers who taught German in the schools did not intend to *adopt* their students. Under the rule of the court below, Nebraska could have outlawed the teaching of German by anybody but a parent. But this Court struck down that Nebraska law.

D. THE RULING BELOW CONFLICTS WITH THIS COURT'S FREEDOM OF ASSOCIATION CASES

Both the common law and the constitutional cases confirm that parents have not only the right but a "high duty" to shape the values of their own children. Many parents recognize their need for help with such a task. That is why so many parents seek help in inculcating those values from other adults who share those values. This case will determine whether parents are still free to fulfill their parental responsibilities by associating with others.

The Boy Scouts of America is an association of like-minded people with a set of shared values. It is an *expressive* organization. Justice O'Connor hinted at the status of the Boy Scouts in her concurrence in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), when she wrote:

> It is easy enough to identify expressive words or conduct that are strident, contentious, or divisive, but protected expression may also take the form of quiet persuasion, inculcation of traditional values, instruction of the young, and community service. Cf *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). The purposes of

> an association, and the purposes of its members in adhering to it, are doubtless relevant in determining whether the association is primarily engaged in protected expression. Lawyering to advance social goals may be speech, *NAACP v. Button*, 371 U.S. 415, 429-430 (1963), but ordinary commercial law practice is not, see *Hishon v. King & Spalding*, 467 U.S. 69 (1984). A group boycott or refusal to deal for political purposes may be speech, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912-915 (1982), though a similar boycott for purposes of maintaining a cartel is not. *Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement.*

Roberts, 468 U.S. at 635-36 (O'Connor, J., concurring in part and in the judgment) [*emphasis supplied*].

Parental rights should grow stronger, not weaker, when citizens peacefully assemble. The freedom to associate should grow stronger, not weaker, when people gather to inculcate shared values, even values that may have become "politically incorrect" with the passage of time. But the New Jersey court has turned the First Amendment on its head. This Court must reverse that ruling to set it right again.

CONCLUSION

The New Jersey Supreme Court erred when it limited its parental rights inquiry to whether Scoutmasters, in and of themselves, could exercise parental rights. The unquestioned

rights of parents are *strengthened*, not *weakened*, when citizens join together to inculcate a set of shared values. The decision of the New Jersey Supreme Court violates the constitutional right to freedom of association, and it should therefore be reversed.

Respectfully Submitted,

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